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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/520,275	11/23/2005	Margaret F Hudson	10704-19 MIS:jb	9004
24223	7590	12/20/2007	EXAMINER	
SIM & MCBURNEY 330 UNIVERSITY AVENUE 6TH FLOOR TORONTO, ON M5G 1R7 CANADA			KELLY, YOLANDA LYNNETTE	
			ART UNIT	PAPER NUMBER
			4174	
			MAIL DATE	DELIVERY MODE
			12/20/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/520,275	Applicant(s) HUDSON ET AL.	
	Examiner Y. LYNNETTE KELLY	Art Unit 4174	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 18 January 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-19 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-19 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>11/29/05 & 4/23/07</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Double Patenting

1. A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

2. Claims 1-3, 5-7 and 15-17 are provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 1-3, 7-9 and 17-19 of copending Application No. 11/188,747.

This is a provisional double patenting rejection since the conflicting claims have not in fact been patented.

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

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A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

3. Claims 1-19 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-17 of U.S. Patent No. 7,229,660.

Although the conflicting claims are not identical, they are not patentably distinct from each other because claim 1 of U.S. Patent No. 7,229,660 differs from claims 1, 5 and 6 of the current application only by a stated ratio of food grade binder to egg. Since the food art is an art where chef's of ordinary skill experiment with differing concentrations in order to achieve desired results, the stated ratio is a concentration that is an obvious optimization of the ratio of food grade binder to egg employed to achieve a desired result. The remaining claims in both applications are therefore substantially identical and all claims are drawn to the same patentable subject matter wherein the subject matter of the pending claims encompasses that of the copending claims.

4. Claims 4, 8-14 and 19 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 4, 10-16 and 20 of copending Application No. 11/188,747. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims are drawn

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to the same patentable subject matter wherein the subject matter of the pending claims encompasses that of the copending claims.

5.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claim Rejections - 35 USC § 102

6. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

7. Claims 1, 2, 5-7, 15 and 17 are rejected under 35 U.S.C. 102(b) as being anticipated by Pickford US 6,261,625.

In regard to claims 1 and 2, Pickford discloses a foodstuff comprising a core and a coating surrounding the core. Column 1, lines 9-15. The coating may be battered or breaded. *Id.* The core may be composed of scrambled egg products. Example 6 and Example 14.

In regard to claim 5 and 6, the core may contain a stabilizer composition that includes gelatin and egg albumen. Column 2, lines 8-31. The eggs inherently include

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an amount of liquid albumen which is increased by the addition of up to 25% of albumen. *Id.* Gelatin may be added in an amount of about 1 to 25%.

In regard to claim 7, garlic sausage may be added to the core. In addition, Pickford adds seasonings to a variety of the foodstuff examples provided. See *e.g.* Examples 10, 15 and 16.

In regard to claims 15 and 17, Pickford's "coating process includes the steps of predest application, batter application, crumb application, flash frying, freezing and packaging." Column 10, lines 40-43.

Claim Rejections - 35 USC § 103

8. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

9. Claims 3,4, 8-14 and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Pickford US 6,261,625, as applied to claims 1 and 7 above, in view of Rapp et al. US 4,469,708.

As stated above, Pickford discloses a scrambled egg foodstuff comprising a core and a coating surrounding the core. Column 1, lines 9-15; Examples 6 and 7. Pickford also teaches that the foodstuff may be formed into the desired shape prior to coating, such as slices, nuggets or mini-patties. Examples 10-12 and 14-16. Pickford's examples contain from 1 to 2 wt. % of the core of salt and from 0.5 to 1 wt. % of the core of pepper. Examples 10-12 and 16. In Example 14, 2.5 wt. % of each stabilizer examples 5 and 6 are added to the core material. Example 14. Example 5 contains 20% whole milk powder. Example 6 contains 8% xanthan gum and 20% modified starch. Pickford teaches that stabilizer examples 5 and 6 may specifically be used as scrambled egg production assistants. Column 4, lines 24-35. In addition, Pickford adds polydextrose to example 14. "Polydextrose is a randomly bonded condensation polymer of dextrose and polycarboxylic acids, for example citric acid." Column 2, lines 32-36. The core may also contain bacon, mushrooms, sausage, fruits and vegetables. Example 14. The added food material may be present in amounts up to 20 %. *Id.* Pickford teaches many of the embodiments of the invention claimed; however, Pickford does not specifically teach all of the ingredient weight percentages claimed.

Rapp teaches a freeze-thaw stable simulated scrambled egg product with a batter coating. Column 2, lines 22-26. Rapp's process involves cooking an egg mixture of egg and water-binding carbohydrates sufficiently to coagulate the albumen content of the egg. Column 3, lines 5-15. The cooked egg mixture is then subdivided into smaller pieces, coated with a binder in order to hold the pieces together, shaped and further coated with a batter. *Id.* Rapp's core material may comprise about 80 wt. % of the food

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product. Column 6, lines 27-61. The core material may contain 0.16 wt. % edible oil, 6.51 wt. % water, 0.17 wt. % xanthan gum, 1.07 wt. % modified starch, vegetables, bacon, sausage, spices, condiments and the like. *Id.*; Column 5, lines 43-54. The batter is used in an amount of 2.68 wt. % of the product, water is used in the amount of 3.57 wt. % of the product and the bread crumbs are used in the amount of 9.75 wt. % of the product. Column 6, lines 27-61. The product is shaped as desired and coated in any typical manner that is well-known within the art. Column 5, line 59 – Column 6, line 20.

The bakery art is an art that is practiced in private kitchens where chefs experiment with differing compositions, concentrations and methods of making to achieve desired results. It would have been obvious for a person of ordinary skill in the art at the time this invention was made to have created a scrambled egg food product, such as Pickford's, with the addition of core components, such as cheese, citric acid, skim milk powder, salt, pepper, etc., as taught by both Pickford and Rapp, in concentrations that will optimize the desired food product result. Furthermore, it would have also been obvious for a person of ordinary skill in the art at the time this invention was made to have created a scrambled egg food product by combining Pickford's binder stabilized scrambled egg with Rapp's simulated scrambled egg product in order to obtain an authentic scrambled egg product with similar ingredient concentrations to the batter coated egg products obtained by both Pickford and Rapp.

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10. Claims 18 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Pickford, as applied to claim 1 above, in view of Pilgrim et al. US 6,103,276 and S. E. Scheideler et al., Studies of Consumer Acceptance of High Omega-3 Fatty Acid-Enriched Eggs, 6 J. APPLIED POULTRY RES. 137-46 (1997) at <http://japr.fass.org/cgi/reprint/6/2/137.pdf>.

As stated above, Pickford discloses a scrambled egg foodstuff comprising a core and a coating surrounding the core. Column 1, lines 9-15; Examples 6 and 7. Pickford teaches the use of pasteurized scrambled eggs; however, Pickford does not teach the use of omega-3 fatty acid eggs.

Pilgrim teaches a livestock feeding method that will result in the production of eggs with significantly enhanced amounts of essential omega-3 fatty acid. Column 4, lines 14-20. Hens fed the inventive livestock composition produce eggs with approximately 1500 mg of omega-3 fatty acids, while typical eggs contain 857 mg of omega-3 fatty acids. Column 8, lines 8-16.

Scheideler tests the effects of high omega-3 fatty acid-enriched eggs. Page 137. Scheideler performs the taste tests on panelists who are fed scrambled eggs made from omega-3 fatty acid eggs. Page 138.

Therefore, since Scheideler teaches a scrambled egg composition made from omega-3 fatty acid eggs and Pickford discloses a scrambled egg foodstuff comprising a core and a coating surrounding that core, it would have been obvious for a person of ordinary skill in the art at the time this invention was made to have used omega-3 enriched eggs to produced Pickford's pasteurized scrambled eggs. Furthermore, since

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typical eggs and omega-3 enriched eggs contain between about 100 to about 1500 mg of omega-3 fatty acids, it would have also been obvious for a person of ordinary skill in the art at the time this invention was made to have produced Pickford's pasteurized scrambled eggs with an added omega-3 fatty acid concentration within the range claimed.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Y. LYNNETTE KELLY whose telephone number is (571)270-3472. The examiner can normally be reached on Monday - Friday EST (First Friday Off).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Donald Tarazano can be reached on 571-272-1550. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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/Gwendolyn Blackwell/
Primary Examiner, Art Unit 1794

Y. Lynnette Kelly
Examiner
Art Unit 4174

/Y. Lynnette Kelly/
Examiner, Art Unit 4174